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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

CRYSTAL MASON,
Appellant,

v.

STATE OF TEXAS,
Appellee.

From the Second Court of Appeals
No. 02-18-00138-CR

Trial Court Cause No. 148710D
From the 432nd District Court of Tarrant County, Texas
The Honorable Ruben Gonzalez, Jr. Presiding

BRIEF ON THE MERITS OF AMICUS CURIAE, THE CATO INSTITUTE

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INTEREST OF THE AMICUS CURIAE

The Cato Institute is a public policy research organization dedicated to individual liberty, limited government, free markets, and peace. It conducts independent, nonpartisan research on policy issues, including criminal justice. One of Cato's criminal justice initiatives focuses on "overcriminalization," which unfairly jeopardizes individual liberties and unnecessarily expands the reach of government. Part of the overcriminalization initiative stresses the strict enforcement of mens rea requirements in statutes carrying criminal penalties because failing to do so results in criminalizing conduct not traditionally considered to be criminal.

No fees have been or will be paid for the preparation and filing of this amicus brief.

SUMMARY OF ARGUMENT

The arguments in this amicus brief overlap to some extent with arguments advanced by the parties' briefs and previously filed amicus briefs. That was unintentional, but unsurprising — there are aspects of the Fort Worth opinion, precedent from this Court, and the language of the statute that are too important to omit from an argument in this case.

Nevertheless, there are three arguments in this amicus brief that do not appear to have been previously addressed. We bring to the Court's attention those three new arguments:

1. The majority and dissenting opinions in *Delay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014) and *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000) all discuss and compare the respective mens rea requirements of two sections of the Election Code:

- Texas Election Code section 253.003(a) (which provides that "A person may not **knowingly** make a political contribution in violation of this chapter." (emphasis added)); and
- Texas Election Code section 253.003(b) (which provides that "A person may not knowingly accept a political contribution **the person knows to have been made in violation of this chapter**." (emphasis added)).

The *Delay* majority and the *Osterberg* minority opinions hold that knowledge of violating the Election Code is necessary to prove guilt under both sections 253.003(a) and 253.003(b). But all four opinions agree that section 253.003(b) clearly requires knowledge that the accused's conduct violates the Election Code. The statute at issue in this case, section 64.012(a)(1) of the Election Code ("A person commits an offense if the person . . . votes . . . in an election in which **the person knows the person is not eligible to vote**" (emphasis added)), has a mens rea requirement that is much closer to section 253.003(b) than section 253.003(a). It appears that all judges on this Court in *Delay*, and all justices on the Texas Supreme Court in *Osterberg*, would find that the language of this statute requires proof that Ms. Mason *knew* that she was ineligible to vote when she filled out a provisional ballot.

2. The Fort Worth court's opinion inappropriately reverses the burden of proof on an essential element of the offense: Ms. Mason's knowledge that she was ineligible to vote. The court noted that "she voted . . . despite the fact that she **may not** have read the warnings," and "this evidence is sufficient to prove that she committed the offense of illegal voting." *Mason v. State*, 598 S.W.3d 755, 779-80 (Tex. App.—Fort Worth 2020, pet. granted) (emphasis added). Instead of requiring **the State** to prove beyond reasonable doubt that Ms. Mason knew she was violating the Election Code, the court held that because she did not prove beyond a reasonable

doubt that she was ignorant of her ineligibility, that is sufficient to support the conviction.

3. The State relies on language in the Provisional Voter's Affidavit, which, if read by Ms. Mason, the State claims would have put her on notice that "it is a felony of the 2nd degree to vote in an election **for which I know I am not eligible**." RR3.Ex.8 (emphasis added). But the affidavit also states, "I understand that giving false information under oath is a misdemeanor." *Id*. So if Ms. Mason was unaware that she was ineligible to vote — which this record supports — reading the affidavit's language would at most put her on notice that she was subject to prosecution for the misdemeanor of giving false information under oath (mistakenly swearing she was not under "supervision"), but not for the felony of voting in an election "for which I know I am not eligible."

For these reasons, and the others articulated in this and other briefs, Ms. Mason's conviction should be reversed.

ARGUMENT

I. This case exemplifies how the failure to adhere to statutory mens rea requirements contributes to unwarranted overcriminalization.

The purpose of the criminal justice system is to protect innocent citizens from harm inflicted by intentional criminal acts. It is **not** to turn innocent citizens into criminals for unintentional acts that caused no harm. Distorting statutes to prosecute citizens who lack the requisite mental state disserves the criminal justice system. This case provides a regrettable example of expanding a statute to punish behavior that was simply an honest mistake, not attempted voter fraud.

A. Overcriminalization is a growing concern that threatens the legitimacy of the criminal justice system.

Overcriminalization has "becom[e] an increasingly important issue in modern-day criminal law. Numerous commentators in the academy and elsewhere have discussed this phenomenon, as has the American Bar Association (ABA)." Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. LAW & PUB. POL. 715, 721 (2013).[1] This development has been described as "the use of the

[1] Larkin clarifies what is meant by "overcriminalization":

> Overcriminalization comes in several forms: '(1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations.' Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005).

Id. at 719 n.13.

criminal law to punish conduct that traditionally would not be deemed morally blameworthy." *Id*. at 720.

Former U.S. Attorney Generals Edwin Meese (who served under President Reagan) and Richard Thornburgh (who served under President George H. W. Bush) also have expressed concern about this development. *See, e.g*., Edwin Meese, III, *Overcriminalization in Practice: Trends and Recent Controversies*, 8 SETON HALL CIRCUIT REV. 505 (2012); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279 (2007).

"Overcriminalization" has been described by the Heritage Foundation as part of "an unfortunate trend" that has seen criminal law "explode[] in size and scope while deteriorating in quality." Heritage Foundation Explains: Overcriminalization, https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization. Overcriminalization threatens to "erode the respect and support that the criminal process needs." Larkin, 36 HARV. J. LAW & PUB. POL. at 755.

B. The credibility of the criminal justice system depends on clearly spelling out and adhering to the mens rea requirements in statutes carrying criminal penalties.

Imprecision and inconsistent enforcement of mens rea standards in criminal statutes contribute to the problem of overcriminalization. Former Attorney General

Meese addressed the Senate Committee on the Judiciary about the role that mens rea plays in constraining the scope of criminal liability:

> From its earliest days, our criminal law has contained both a moral and a practical element. For an act to be a crime, the law has traditionally required both that the act cause (or threaten) some kind of harm and that the individual who committed the act do so with malicious intent. The requirement of a guilty mind, also called *mens rea*, helps to separate conduct that may be harmful but that is not morally culpable from conduct truly deserving of criminal penalties. In this way, [the] criminal intent requirement protect[s] individuals who accidentally commit wrongful acts or who act without knowledge that what they are doing is wrong.

Testimony by Edwin Meese III, Hearing Before the Committee on the Judiciary, United States Senate, January 20, 2016, pp. 1-2, https://www.heritage.org/article/testimony-the-adequacy-criminal-intent-standards-federal-prosecution. Other commentators have echoed this important principle:

> The historical role that mens rea standards played in protecting individuals from prosecution for unintentional acts is not always kept in sharp focus. Increasingly, the criminal law punishes accidents and criminalizes behavior without any regard to the defendant's intent. Mens rea reformers are concerned about this trend and want to ensure that the state does not incarcerate 'people who engage in conduct without any knowledge of or intent to violate the law and that they could not reasonably have anticipated would violate a criminal law.'

Giancarlo Canaparo, Paul Larkin, Jr. & John Malcom, *Four Ways the Executive Branch Can Advance Mens Rea Reform*, pp. 2-3, January 28, 2020, https://www.heritage.org/courts/report/four-ways-the-executive-branch-can-

advance-mens-rea-reform; *see also* John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 TEX. REV. L. & POL. 249 (2015-2016); Benjamin Levin, *Mens Rea Reform and its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491 (Summer 2019).

This Court also has recognized that "where otherwise innocent behavior becomes criminal because of the circumstances under which it is done, a culpable mental state is required as to those surrounding circumstances." *Huffman v. State*, 267 S.W.3d 902, 908 (Tex. Crim. App. 2008) (quoting *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989)). In *Cook v. State*, 884 S.W.2d 485 (Tex. Crim App. 1994), this Court quoted the United States Supreme Court:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. . . .

Id. at 487 (quoting *Morissette v. U.S.*, 342 U.S. 246, 250 (1952)).

The weakening of mens rea standards "is not some abstract problem. It has real consequences for real people," as well as for the criminal justice system. Meese Testimony, *supra* at 3. As former Attorney General Meese has cautioned:

> Criminal laws with weak or inadequate intent requirements empower the government to rain down these devastating consequences in situations where a person didn't know he was doing anything wrong or was powerless to stop the violation. This harms the individuals ensnared in these unjust prosecutions, as well as society at large. It breeds distrust of government and undermines the rule of law, which is

> predicated on the ability of individuals to understand the law and conform their conduct to it. More than anything else, it is deeply and fundamentally unfair. Before the government brands a person — or an organization — a criminal, it should have to prove that his conduct was morally culpable.

Id. at 4.

Consequently, it has become "increasingly important" for a legislative body "to ensure that the crimes it creates . . . have adequate mens rea protections. *Id.* at 2. Legislatures must "legislat[e] more carefully and articulately regarding mens rea requirements, in order to protect against unintended and unjust conviction." Canaparo, *et al.*, *supra* at 3. Where, as here, the Legislature has done that, courts should honor the specific mens rea language used in statutes.

C. The Legislature clearly spelled out the mens rea requirement for voting illegally, but the State failed to adhere to that standard.

In the statute at issue here, the Legislature "carefully and articulately" defined the mens rea standard. Unfortunately, the trial court and the court of appeals failed to adhere to that standard.

1. The mens rea requirement in the statute under which Ms. Mason was prosecuted requires that "the person knows that the person is ineligible to vote."

Ms. Mason was prosecuted under section 64.012(a)(1) of the Texas Election Code. It provides: "A person commits an offense if the person . . . votes . . . **in an election in which the person knows the person is not eligible to vote**." TEX. ELEC. CODE ANN. § 64.012(a)(1) (emphasis added).

This articulation of the mens rea requirement contrasts with many sections of the Penal Code, as well as the other subsections of the Election Code statute at issue here. *See e.g.* TEX. ELEC. CODE ANN. §§ 64.012(a)(2), 64.012(a)(3), 64.012(a)(4). The language consistently used in these and other statutes prohibits "knowingly" committing certain acts, when, as this Court has observed, "it is 'not at all clear how far down the sentence the word 'knowingly' is intended to travel.'" *Delay*, 465 S.W.3d at 250.

If the Legislature had followed that pattern here, it simply would have prohibited "knowingly voting in an election in which the person is not eligible to vote." That might have left doubt about whether "knowingly" referred to the voting or the ineligibility. But in this statute the Legislature diverged from the common phraseology and eliminated any doubt by clarifying that the person must "know the person is not eligible to vote."

2. The court of appeals acknowledged the lack of clear evidence that Ms. Mason knew she was ineligible to vote.

The record establishes that Ms. Mason did not know she was ineligible to vote. 2RR126. Only one witness even suggested she knew otherwise, and that witness testified only that he saw Ms. Mason looking at the Provisional Voter Affidavit. But that witness could not testify that Ms. Mason had actually read the fine print on the left side of the affidavit form that addressed eligibility and understood it to mean that she was ineligible to vote. 2RR86-87. Ms. Mason testified that she did not read

that fine print, 2RR122, and was not otherwise aware that she was ineligible. 2RR126.

The Fort Worth Court of Appeals conceded that "Mason may not have known with certainty that being on supervised release as part of her federal conviction made her ineligible to vote under Texas law." *Mason*, 598 S.W.3d at 779. But in a perversion of the burden of proof, the court noted that "she voted anyway, signing a form affirming her eligibility . . . despite the fact that she may not have read the warnings" and "this evidence is sufficient to prove that she committed the offense of illegal voting." *Id.* at 779-80. In other words, instead of requiring **the State** to prove beyond a reasonable doubt that Ms. Mason knew she was violating the Election Code when she filled out a provisional ballot, the court below is suggesting that because she did not prove beyond a reasonable doubt that she was ignorant of her ineligibility, that is sufficient to support the conviction. That reversal of the burden of proof warrants this Court's attention.

Moreover, the Provisional Voter Affidavit on which the State relies to establish Ms. Mason's "knowing" conduct demonstrates the lack of a requisite mens rea for her felony conviction for illegal voting. The court of appeals criticized Ms. Mason for signing and submitting the affidavit without being certain about whether her supervised release made her ineligible to vote. But the language of the affidavit makes clear that any false statement regarding her "supervision" or other status —

let alone a misunderstanding about it — would expose her to liability for the misdemeanor of giving false information under oath, not the felony of illegal voting.

The language on the left side of the affidavit states, "I am a resident of this political subdivision, have not been finally convicted of a felony or if a felon, I have completed all of my punishment including any term of incarceration, parole, supervision, period of probation, or I have been pardoned." RR3.Ex.8. It further states "I understand that **giving false information under oath is a misdemeanor**, and I understand that **it is a felony of the 2nd degree to vote in an election for which I know I am not eligible**." *Id.* (emphasis added).[2] Even if Ms. Mason had read and understood this part of the affidavit as the State suggests, it would have informed her that if she falsely represented that she was no longer under "supervision," she would be guilty of the misdemeanor of giving false information under oath — an offense of which she has not been charged. But the affidavit also makes clear that Ms. Mason would be guilty of the felony of illegal voting **only** if she voted "**know[ing] [she] was not eligible**." *Id*. (emphasis added). The affidavit did not expressly define "eligibility" — it just provided that she could not vote with the knowledge that she was "ineligible" to do so. There is no evidence that she did.

[2] When the State quotes from the Affidavit it omits the language about giving false information under oath being a misdemeanor and replaces it with an ellipsis. State's BOM at 12.

3. *Delay v. State* is binding precedent requiring that in Election Code prosecutions the State must prove knowledge that "undertaking the conduct under those circumstances in fact constitutes a 'violation of the Election Code.'"

This Court addressed the importance of interpreting mens rea requirements to avoid criminalizing otherwise innocent activity under the Election Code in *Delay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014). In *Delay*, an eight-judge majority of the Court agreed that knowledge of the predicate acts alone was **insufficient** to prove mens rea. *See id.* at 250. Instead, knowledge that those acts were violations of the Election Code was required. "Section 253.003(a) requires that the actor be aware, not just of the particular circumstances that render his otherwise-innocuous conduct unlawful, but also of the fact that undertaking the conduct under those circumstances in fact constitutes a 'violation of' the Election Code." *Id*. Or, put another way, "[T]he state had to prove . . . that the contribution made by [Delay's political action committees] violated the Election Code, that [Delay] was active in the process, and that he knew that the process violated the Election Code." *Id.* at 253 (Johnson, J. concurring).

Although Ms. Mason cited the *Delay* opinion in her briefing to the court of appeals, the court mentioned *Delay* only once, dismissively, in a footnote. *See Mason*, 598 S.W.3d at 769, n.12. The Fort Worth court declined to apply this Court's *Delay* opinion because, in its view. "the different statutes at issue in *Delay* were ambiguous . . . because they placed the 'knowingly' descriptor before both the verb

describing the actus reas and the following clause describing the actus reas." *Mason*, 598 S.W.3d at 769 n.12.

The Fort Worth court is correct about the Election Code provision in *Delay* being more ambiguous than the one here. *Compare* TEX. ELEC. CODE ANN. §253.003(a) ("A person may not knowingly make a political contribution in violation of this chapter."), *with* TEX. ELEC. CODE ANN. § 64.012(a)(1) ("A person commits an offense if the person . . . votes . . . in an election in which the person knows the person is not eligible to vote.") But that is no reason to ignore the *Delay* holding; it is all the more reason to apply it. Even with the ambiguity in the statute at issue in *Delay*, this Court still held that the accused must know that his conduct violated the Election Code. *See Delay*, 465 S.W.3d at 250-51. The statute here removes any ambiguity and explicitly requires the defendant to have knowledge that the Conduct violates the Election Code. So, the difference in the statutes should have made Mrs. Mason's conviction more ripe for reversal than Mr. Delay's. Yet the opposite happened: this Court reversed Mr. Delay's conviction because of his lack knowledge that his conduct violated the Election Code, while the Fort Worth court affirmed Ms. Mason's conviction because it found that same lack of knowledge to be irrelevant.

One way to analyze these Election Code provisions and the holdings interpreting them is to compare the statute involved in *Delay* (section 253.003(a)),

the statute right after it, which is mentioned for comparison purposes in the *Delay* opinion (section 253.003(b)), and the statute at issue in this case (section 64.012(a)(1)), and the way that those statutes are interpreted in the majority and dissenting opinions in *Delay*, and in a civil case, *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000), that addresses the same statutes.

Election Code provision	**Role in this analysis**	**Statutory language**	**Application by courts**
§ 253.003(a)	Statute at issue in *Delay*	"A person may not knowingly make a political contribution in violation of this chapter."	*Delay* majority (8-1) and *Osterberg* dissent (5-4) say this requires knowledge that conduct violates the Election Code. Lone dissenter in *Delay* and Supreme Court in *Osterberg* say only knowledge of conduct required.
§ 253.003(b)	Mentioned in *Delay* dissent and *Osterberg* for comparison	"A person may not knowingly accept a political contribution the person knows to have been made in violation of this chapter."	*Delay* majority and dissent and *Osterberg* majority and dissent all say that this requires knowledge that conduct violated Election Code.
§64.012(a)(1)	Statute at issue in *Mason*	"A person commits an offense if the person . . . votes . . . in an election in which the person knows the person is not eligible to vote."	Fort Worth Court of Appeals says only knowledge of conduct is required, and knowledge that conduct violated Election Code is irrelevant.

As this chart demonstrates, the statutory mens rea requirement in section 64.012(a)(1) of the Election Code (this case) is much closer to the mens rea

requirement in section 253.003(b) of the Election Code ("knows to have been made in violation of this chapter") than to section 253.003(a) of the Election Code ("knowingly make a political contribution in violation of this chapter). The majority[3] and the dissent[4] in *Delay*, and the majority[5] and dissent[6] in *Osterberg* **all** held that under the statute with a mens reas requirement almost identical to the statute at issue here, knowledge that the defendant's conduct violated the Code was required.

4. The authorities relied on by the Fort Worth Court of Appeals and the State are neither binding nor persuasive.

Instead of following the analysis of the two highest courts of the State in *Delay* and *Osterberg*, the Fort Worth Court of Appeals relied on four court of appeals opinions. *See Mason*, 598 S.W.3d at 768 (citing *Thompson v. State*, 9 S.W. 486 (Tex. Ct. App. 1888); *Medrano v. State*, 421 S.W.3d 869 (Tex. App.—Dallas 2014, pet. ref'd); *Jenkins v. State*, 468 S.W.3d 656 (Tex. App.—Houston [14th Dist.] 2015), *pet. dism'd improvidently granted*, 520 S.W.3d 616 (Tex. Crim. App. 2017) (per

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[3] *Delay*, 465 S.W.3d at 250-51.

[4] *Delay*, 465 S.W.3d at 254 (Meyers, J., dissenting) "[I]t should be noted that **Section 253.003(b)**, the provision that immediately follows the one at question here, states that 'A person may not knowingly accept a political contribution the person knows to have been made in violation of this chapter.' There, **the Legislature specifically identifies that the actor must know of the illegality**. In the provision that immediately precedes it, however, the Legislature makes no such clarification. If the Legislature intended what the majority now holds, it would have worded the provision in the same way it did Section 253.003(b): a person may not knowingly make a political contribution the person knows to be in violation of this chapter.") (emphasis added).

[5] *Osterberg*, 12 S.W.3d at 38 ("The Legislature made clear in other sections of the Election Code when it specifically wanted to require a person to know the law is being violated. *See, e.g.,* TEX. ELEC. CODE § 253.003(b). . . . The Legislature clearly knew how to require that the actor have knowledge of the Election Code before being charged with a violation."

[6] *Osterberg*, 12 S.W.3d at 69-70 (Enoch, J. dissenting).

curiam); *Heath v. State*, No. 14-14-00532-CR, 2016 WL 2743192 (Tex. App.—Houston [14th Dist.] May 10, 2016, pet. ref'd)). *Thompson* and *Medrano* pre-date *Delay*, and should be considered abrogated by this Court's subsequent opinion in *Delay*; *Jenkins* and *Medrano* were decided after *Delay*, but relied solely on *Medrano*, ignoring *Delay*. When due deference is given to *Delay*, the State's edifice of authority crumbles.

First, none of these cases involved the submission of a provisional ballot, at the invitation of polling place official, that was never counted — the conduct for which Ms. Mason was convicted. In each of those cases the defendant cast a ballot that was counted.

Second, these cases are factually distinguishable. In *Thompson*, the prospective voter had been convicted of felony assault with intent to murder, and at that time a felony conviction carried a lifetime ban from voting. *See Medrano*, 421 S.W.3d at 884. Under the current law, a person convicted of a felony is eligible to vote once they have "fully discharged the person's sentence, including any term of incarceration, parole, or supervision." TEX. ELEC. CODE § 11.002. Ms. Mason had completed her term of incarceration; and her federally supervised release program is not equivalent to state parole, *U.S. v. Ferguson*, 369 F.3d 847, 849 n.5 (5th Cir. 2004), or to state community supervision, *Speth v. State*, 6 S.W.3d 530, 532 n.3 (Tex.

Crim. App. 1999). So, there is considerably more ambiguity about whether Ms. Mason should have known she was ineligible to vote than Mr. Thompson.

The other three cases involved deliberate and pre-meditated voter fraud. In *Medrano*, a prospective voter lied about her address so she could register in a different precinct to vote for her uncle. *Medrano*, 421 S.W.3d at 884. Both *Jenkins* and *Heath* arose from the same scheme by ten politically active voters who conspired to falsely changed their voter application addresses from the homes where they lived to a motel (that they first stayed in the night of the election) because it was within a district voting on an issue that was of interest to them. *Jenkins*, 468 S.W.3d at 660; *Heath*, 2016 WL 2743192, at *1-2.

In contrast, Ms. Mason's submission of a provisional ballot was the farthest thing from voter fraud, but was instead an innocent mistake. She was not politically active and had no strong motivation to vote, other than pleasing her mother. *See* 2RR116, 143 ("I didn't even want to go vote. My mom made me go vote."). And there was no question that Ms. Mason's residence was accurately reported, unlike the knowingly fraudulent addresses that *Medrano*, *Jenkins*, and *Heath* turn on. In short, Ms. Mason's conduct was wholly unlike the conscious subterfuge of the voting residence requirements for a political purpose in *Medrano*, *Jenkins*, and *Heath*, but rather involved an innocent ignorance of the status imposed by a federal release program.

But most important, the lower court cases cited by the State all rest on an analytical framework that cannot be squared with this Court's more recent holding in *Delay*. The other cases all trace back to *Thompson*, which affirmed a jury instruction stating, "If the defendant had been convicted of an assault with the intent to murder . . . and if he knew that he had been so convicted, such knowledge of his conviction would be equivalent in law to knowing himself not to be a qualified voter." *Thompson*, 9 S.W.2d at 486. Yet in *Delay*, this Court flatly rejected that reasoning, and held that proving a violation of the Election Code required "**that the actor be aware**, not just of the particular circumstances that render his otherwise-innocuous conduct unlawful, but also of the fact **that undertaking the conduct under those circumstances in fact constitutes a 'violation of' the Election Code**." *Delay*, 465 S.W.3d at 250 (emphasis added). It did **not** hold that knowledge of the underlying act was equivalent to knowledge of violating the Code, and squarely rejected the State's argument in *Delay* to that effect.

The bottom line is that, after *Delay*, *Thompson* cannot be considered good law on the question of the knowledge required to prove an Election Code violation. Without *Thompson*, *Medrano* falls; without *Medrano, Jenkins* falls. None of those cases survives this Court's clear holding in *Delay*.

II. The prosecution of Ms. Mason is particularly unjust because a federal statute invites and exonerates the conduct that is the basis of her prosecution.

The 2000 national election exposed flaws in and raised concerns about voting irregularities throughout the country. In response, the United States Congress passed the Help America Vote Act (HAVA). *See* 52 U.S.C. § 21082. Among other things, HAVA provides that if individuals believe they are eligible to vote in a precinct, but their name does not appear on the rolls of registered voters in that precinct, election officials are required to inform the prospective voter that they can submit a provisional ballot. *Id.* § 21082(a)(1), (2). The provisional ballot is subsequently held, subject to a final determination of the prospective voter's eligibility. *Id.* § 21082(a)(3). If the prospective voter turns out to have been eligible, the vote is counted; if the voter is ineligible, the ballot is discarded without being counted and the prospective voter is informed. *Id.* § 21082(a)(4), (5). In 2003, the Texas Legislature "implement[ed]" HAVA by amending the Election Code, adopting a procedure by which individuals could cast provisional ballots and incorporating these same basic procedures. *See Mason*, 598 S.W.3d at 776-77.

Before HAVA, if prospective voters were not on the voter rolls, they were not allowed to vote; even if the polling list turned out to be in error, that voter's vote was forever lost. *See Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004). But HAVA provides a saving procedure for eligible voters

erroneously missing from voter rolls, and a safe harbor for uncertain voters to submit a provisional ballot that is not counted if they turn out to be ineligible.

Ms. Mason was a classic candidate for a provisional ballot. Her eligibility to vote was terminated while she was incarcerated, the notice of her ineligibility was mailed to her address while she was in prison, and she never saw the notice. *See Mason*, 598 S.W.3d at 765. When she submitted her provisional ballot she had served her complete prison sentence, was released from a half-way house, and returned to her permanent home address. The supervisor of her release program testified that its participants were not told they were ineligible to vote while completing their supervised release. *Id*. When her name did not appear on the roll, she was invited by an election official to submit a provisional ballot, in accordance with HAVA, and she did. *Id.* at 766. When a subsequent review revealed that she was ineligible, her provisional ballot was not counted, in accordance with the statute. 3RR, Ex. 6.

HAVA creates a safe harbor for those who are innocently unsure about whether they are eligible to vote, and it does so in a way that cannot jeopardize the integrity of the election. Ms. Mason availed herself of that process after being invited to do so by an election official at her usual polling place. For the State to prosecute her for submitting a provisional ballet when she was innocently unsure about her eligibility to vote is unjustly punitive under these circumstances. Applying the

proper mens rea requirement in section 64.012(a)(1) of the Election Code allows that perverse result to be corrected.

III. The failure to properly interpret and apply mens rea requirements in this case would result in potentially far-reaching negative consequences.

In the 2016 election, over 44,000 provisional ballots were submitted by prospective voters in Texas who were later determined to be ineligible. *See* Petition for Discretionary Review at 3. If actual knowledge of ineligibility to vote is not required, then every one of those 44,000 provisional voters who were ultimately determined to be ineligible could have been prosecuted, as long as they knew the underlying fact that technically rendered them ineligible, even if they did not know they were actually ineligible.

For example, consider a voter who lived and voted in one county her entire adult life, but prior to an election moved to an assisted living facility in a neighboring county and innocently failed to update her voter registration. She might have a good faith belief that she could vote in her old county because that is where she is still registered. However, according to the Fort Worth Court of Appeals, going to vote at the polling place where she had voted for decades could result in a criminal conviction based on an innocent mistake. The voter would have knowledge of the underlying fact that rendered her ineligible to vote — moving to another county — but no knowledge that moving rendered her ineligible to vote in her old precinct.

Alternatively, assume that same person did not know she had to re-register in her new county, but decided to go vote in her new county. She would not find herself on the voting rolls in the new county, but could, under HAVA, submit a provisional ballot. The provisional ballot ultimately would be rejected because she had not registered in her new county. However, according to the Fort Worth Court of Appeals, she could be prosecuted because she knew of the underlying facts — moving to and not registering in her new county — that rendered her ineligible, even if she did not actually know she was ineligible.

Criminal law should not be a scheme to set traps for the unwary. The lower court's interpretation of the Illegal Voting Statute and HAVA would not only result in a massive example of criminalizing innocent conduct, but awareness of these consequences would have a chilling effect on prospective voters uncertain about their eligibility. Anyone who did not appear on the voting rolls at the polling place where they attempted to vote would be forced to walk away without voting, rather than preserving the possibility of voting through the HAVA procedures that Congress carefully designed to afford protection both for the blameless individual and the integrity of the voting process. The court of appeals' decision in this case is entirely counterproductive to the purpose of a statute that was intended to "help America vote" and undoubtedly will have a chilling effect on anyone who has a

legitimate question about their eligibility to vote because it effectively eliminates any protection for those exercising their right to vote in good faith.

CONCLUSION AND PRAYER

Amicus, Cato Institute, urges the Court to reverse the conviction and order a judgment of acquittal.

Respectfully submitted,

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